

E-FILED 10-06-2010

NOT FOR CITATION
IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION,

No. C10-00152 LHK (HRL)

Plaintiff,

**ORDER RE
PLAINTIFFS/INTERVENORS' MOTION
FOR PROTECTIVE ORDER**

MARIA DOLORES PEREZ, MANUEL SOTO,
JUANITA VELASQUEZ and MARIA ISABEL
LUCIO,

[Re: Docket No. 30]

Plaintiffs/Intervenors,

v.

MONTEREY GOURMET FOODS, INC.,

Defendant.

Plaintiffs/Intervenors move for a protective order. Defendant Monterey Gourmet Foods, Inc. (MGF) opposes the motion. The Equal Employment Opportunity Commission (EEOC) has not offered any statement in connection with this discovery dispute. The matter is deemed appropriate for determination without oral argument, and the October 12, 2010 hearing is vacated. Civ. L.R. 7-1(b). Upon consideration of the moving and responding papers, this court issues the following order.

The EEOC filed this action against MGF alleging, among other things, sexual harassment and retaliation in violation of Title VII, 42 U.S.C. § 2000e-2 and § 2000e-3. The aggrieved persons subsequently were permitted to intervene, and they filed a complaint alleging

1 sexual harassment, gender discrimination, retaliation, and wrongful termination in violation of
2 federal and state laws.

3 MGF served notices for the depositions of each intervenor, requesting the production of
4 all documents relevant to the claims being asserted in this action. (This court is told that all of
5 these depositions have been completed, with the exception of one that was taken off-calendar at
6 intervenors' request). On the eve of the first deposition, intervenors' counsel advised MGF's
7 counsel that she had recordings of two separate conversations between unnamed intervenors
8 and unnamed MGF employees. The tapes were made by the unnamed intervenors prior to this
9 litigation and without the knowledge or consent of the MGF employees in question. The
10 intervenors claim that, at the time the recordings were made, they were unaware of the legal
11 implications of their actions. They say that they taped these conversations solely to protect
12 themselves and in the hopes of prompting MGF's human resources department to take action
13 with respect to their complaints of harassment.

14 There is no dispute that the recordings are relevant and responsive to MGF's document
15 requests. Nevertheless, the intervenors agree to produce the tapes to defense counsel only on
16 certain conditions, including that (a) the recordings not be made known to, or shared with, the
17 MGF employees' whose statements were recorded and (b) MGF must agree not use the
18 recordings in any way without the court's advance blessing. MGF refused these conditions and
19 instead proposed that the recordings need not be produced at all *if* intervenors agree not to use
20 the recordings in any way—i.e., agree that the tapes will not be “used, shown to, referred to,
21 commented on, or used to interrogate any witness by any plaintiff, plaintiffs' witnesses or
22 plaintiffs' counsel at any time.” (Shelton Decl. ¶ 7, Ex. B). Intervenors rejected this proposal,
23 reserving the right to make any use of the recordings that they believe falls within the law.
24 Here, intervenors' counsel pointed out that if the MGF employees in question learned of the
25 existence of the tapes, then intervenors would know that the “leak” had come from defense
26 counsel and that intervenors would use any such “leak” as evidence of retaliation. (*Id.*).

27 The parties having reached an impasse, intervenors now move for a protective order
28 essentially precluding anyone other than defense counsel and MGF's president from knowing

1 about, accessing, or listening to the recordings. They further request that defense counsel and
2 MGF's president be expressly prohibited from disclosing to anyone the identities of the
3 recorded persons. MGF maintains that if intervenors intend to use the recordings in any way in
4 this proceeding, then MGF should be permitted to disclose the existence of the tapes to the
5 persons whose conversations were recorded and to conduct any appropriate follow-up
6 discovery.

7 Upon a showing of "good cause," courts may "issue an order to protect a party or person
8 from annoyance, embarrassment, oppression, or undue burden or expense" in discovery by
9 "specifying terms, including time and place, for the disclosure or discovery." FED. R. CIV. P.
10 26(c)(1)(B). Here, intervenors say that a protective order is necessary to prevent MGF or the
11 MGF employees whose statements were unknowingly recorded from retaliating against them
12 for making the tapes—i.e., from pursuing any legal action for the surreptitious recordings.
13 Intervenors argue that, without such a protective order, the instant lawsuit will become unduly
14 complicated. MGF contends that if intervenors wish to make use of the recorded conversations,
15 then they will need to face the possible consequences of their actions, including any legal
16 remedies which MGF or the recorded employees may be entitled to pursue.

17 Now, for the first time in their reply papers, intervenors say that they agree not to use or
18 refer to the recordings in any way and will, with that agreement, withhold the tapes from
19 production. That essentially is the deal proposed by MGF during the parties' meet-and-confer
20 negotiations. Alternatively, intervenors say that if the tapes are produced, then they believe that
21 the production should be made pursuant to the terms of the protective order they seek, or at the
22 very least, under terms similar to those issued in *Roberts v. Americable, Int'l, Inc.*, 883 F. Supp.
23 499 (E.D. Cal. 1995).

24 This court will leave it up to intervenors:

25 If the parties agree (as they seem willing to do) to the non-production of the tapes in
26 exchange for intervenors' agreement not to use or refer to the recordings in any way, then the
27 instant motion is deemed moot.
28

1 However, if intervenors wish to make use of the recordings, then this court agrees that
2 on balance, and in the interests of justice, MGF should be permitted to review the recordings,
3 make its own judgments as to their contents, disclose the existence of the tapes to the persons
4 whose conversations were recorded to avoid any unfair surprise at deposition or trial, and to
5 conduct any appropriate follow-up discovery. *See Roberts*, 883 F. Supp. at 505 (holding that
6 the interests of justice required that plaintiff's former supervisor be given an opportunity to
7 review secret recordings prior to his deposition). *See also Costa v. AFGO Mechanical Servs.,*
8 *Inc.*, 237 F.R.D. 21 (E.D.N.Y. 2006) (denying motion for protective order and agreeing that
9 where a recording was obtained "in a less than forthright manner," then the tape should be
10 disclosed) (quoting *Roberts*, 883 F. Supp. at 505). Should intervenors choose this option, the
11 tapes shall be produced to MGF within 14 days from the date of this order, and their motion to
12 preclude anyone except MGF's president and defense counsel from knowing about, accessing
13 or listening to the tapes is denied. Nevertheless, use of the recordings will be subject to the
14 following terms:

- 15 1. Only parties to this action, and their counsel, may listen to the tapes (or read any
16 transcripts of the recordings).
- 17 2. Non-parties may listen to recordings or review transcripts of their own
18 conversations, but not those of anyone else.
- 19 3. The recordings shall be deemed "Confidential" and shall be marked accordingly.
- 20 4. The recordings shall be used solely in connection with prosecuting, defending, or
21 settling this action, or preparing for trial, or any related appellate proceeding.
- 22 5. Nothing in this order, however, shall be construed as prohibiting MGF or the
23 recorded employees from pursuing appropriate legal remedies, if any, they may
24 have with respect to the recordings.

25 SO ORDERED.

26 Dated: October 6, 2010

27 
28 HOWARD B. LLOYD
UNITED STATES MAGISTRATE JUDGE

1 5:10-cv-00152-LHK Notice has been electronically mailed to:

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